U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 12 September 2003

BALCA Case No.: 2002-INA-94
ETA Case No.: P1998-CA-09404995/ML

In the Matter of:

ANN GOODWIN RANEY,
Employer,

on behalf of

MARIA TRINIDAD GUTIERREZ,
Alien.

Appearances: Leonard W. Stitz, Esquire

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a private household for the position of Domestic Cook. (AF 22-23).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File. ("AF").

STATEMENT OF THE CASE

On January 23, 1997, Employer, Ann Goodwin Raney, filed an application for alien employment certification on behalf of the Alien, Maria Gutierrez, to fill the position

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

of Domestic Cook. Minimum requirements for the position were listed as two years experience in the job offered. (AF 22-23).

Employer reported no applicants were referred in response to her recruitment efforts. (AF 27-28).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on March 27, 2001, citing Section 656.20(c)(8) and questioning the existence of a bona fide job opportunity open to U.S. workers. The CO concluded the application contained insufficient information to determine whether the position of Domestic Cook actually exists in Employer's household or whether the job was created solely for the purpose of qualifying the Alien as a skilled worker.[3] Documentation "at a minimum" was to include data to support each of her assertions and was to include responses to eight enumerated questions including documentation where appropriate. (AF 18-21).

In Rebuttal, Employer responded to the eight enumerated questions, providing some of the documentation requested. (AF 11-15).

A Final Determination denying labor certification was issued by the CO on August 14, 2001, based upon a finding that Employer had failed to submit any documentation of her income, as the NOF requested. Citing that combined with the fact the Employer has never hired a domestic cook, the CO concluded Employer did not convincingly establish a permanent full-time position open to U.S. workers.

Employer filed a Request for Review by letter dated August 27, 2001, and submitted copies of tax returns in conjunction with her request. The matter was referred

[3] The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas, there is a current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). Because the occupation of Domestic Cook can require one to two years for proficiency, it is considered to be a "skilled worker" under the immigration law. Employer was instructed to explain why the position of Domestic Cook in their household should be considered a bonafide job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law.

to and docketed in this Office on February 28, 2002. (AF 1-7). Employer filed an Appellant's Brief/Statement of Position on March 26, 2002.

DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F2d. 666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979).[4] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, as noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued."

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), held that if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988). The denial of certification is not appropriate, however, if the CO requests documentation which is

[4] The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. *See* S. Rep No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

difficult to obtain and the employer submits other evidence sufficient to rebut the CO's challenge. *Engineering Measurement Co.*, 1990-INA-171 (Mar. 29, 1991).

In the instant case, Employer failed to adequately address the issues raised by the CO in the NOF, and accordingly, labor certification was properly denied. In the NOF, the CO was specific in his request for rebuttal documentation, having enumerated eight questions for Employer to respond to, including specific requests for documentation where appropriate. With respect to the issue of Employer's ability to pay the salary for the petitioned position, the CO instructed "[y]our answer must be support (sic) by providing a copy of your Federal income tax return for the immediately preceding calendar year," documents that should have been easily obtainable and which have a direct bearing on the resolution of this issue. *Gencorp*. *See also Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) ("When applying the totality of the circumstances test to domestic cook applications, factual subjects that may typically be examined to determine whether the job is clearly open to a U.S. worker may include, *but are not limited to* the percentage of the employer's disposable income that will be devoted to paying the cook's salary…." (footnote omitted)).

As was noted by the CO in his determination to deny certification, Employer failed to submit any documentation of her income. While Employer, in her Request for Review, submitted copies of her Income Tax Returns for years 1998, 1999 and 2000, rebuttal evidence first submitted with the request for review, after issuance of the Final Determination, is not part of the record and cannot be considered on appeal pursuant to 20 C.F.R. § 656.27(c). *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Arthur Walters*, 1994-INA-7 (Nov. 30, 1994); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991); *Fifteenth Street Garage*, 1990-INA-52 (Nov. 21, 1990); *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988). Given Employer's failure to produce the documentation requested, and Employer's failure to submit alternative adequate documentation, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.